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Supreme Court of the United States
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Joseph S. Maresca — Petitioner Pro-Se

versus

Dr.Elliot L Mancall MD — Respondents
Thomas Jefferson University Hospital

On Petition for a REHEARING under Rule 44
Petition for Certiorari denied 10-12-06
Due 10-27-06 within 25 days

To Court of Appeals 3rd Circuit: 04-3103

Joseph S. Maresca-Pro-Se — PETITIONER-PRO-SE
of Record
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Submissions to Date: Writ of Certiorari-Book I,
Appendix-Book II, Petitioner's Reply to the Respondents,
Rule 44 Petition for a Rehearing

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REHEARING BRIEF -MEDICAL MALPRACTICE CASE
5 QUESTIONS PREVIOUSLY PRESENTED IN THE
BOOK I OF THE PETITIONER

Controlling Effect Implications and Other Substantial Grounds Not Previously Presented:

1. An award for Dr.Mancall just preceding trial may present a conflict of interest because it places him in competition with his own neurologist expert and the plaintiff expert. The Journal of the American Board of Psychiatry and Neurology reports the following in the Winter '04 ABPN:

Elliot L. Mancall MD- Received the 2003 Presidential Medal from the American Academy of Neurology for serving as founding editor of Continuum and for continuous editorial service from 1994 to 2003.

It is an award of the President of the American Academy of Neurology. Did Dr.Mancall or his institution of TJU disclose the existence of this lawsuit to the award body? Why or why not? Did this award detract from Dr.Mancall's insurer paying this case before trial. If the award body knew of the existence of this lawsuit, would they have granted the Presidential Award to Dr. Mancall at that time? Does the award just before trial interject politics into the Trial Court? Is this award the reason why the District Court and Appellate Court do not cite huge volumes of testimony from Diplomate Deng-Acupuncturist, Dr. Waterman-Rheumatologist, Dr. Simon Lee, Physiatrist and PhD in Cellular Biology and Dr. Kellman MD-Internist? Videos of Drs. Waterman-Rheumatologist, Kellman-Internist were shown in the District Court from the afternoon of 5-4-04 through the morning of 5-5-04. [2 half day video sessions in the DC by Spherion]

Diplomate Deng was sworn in at trial on 5-4-04.
Only the expert video of Diplomate Felder MD is cited.
A.1 to A14; A19-A.24
This testimony and the supporting exhibits in Book II prove that the Plaintiff's Case in Chief is "wholly supported" by the facts and within the reasonable person standard at the close of the Plaintiff's Case in Chief. There is absolutely no grey area in the gross range of spinal motion issues opined by Diplomate Deng and Dr. Waterman-Rheumatologist.
[A33-A39] [A57-A71]
The controlling effect is that all medical deponents at trial are placed in an awkward position between an award decision of the medical profession , the evidence of the case and the political calculus accompanying a "Presidential Award" . According to Associate Justice Sandra Day O'Connor, "the Courts are not a political body". The Supreme Court is asked to weigh whether or not the Petitioner's "Due Process" rights have been marginalized. Admitted facts wholly supporting the case are contained in Book I- page v (APPROVED EVIDENCE)

2. Diplomate Deng's testimony as to gross range of motion is outside the scintilla of evidence and grey area. It is irrefutable testimony unchallenged by Bradley Goewert,Esq. counsel for the defense. The controlling effect is that this evidence governs and completely satisfies the BROPHY standard which requires that the patient's presentation must be obvious to an ordinary person and that the need for medical treatment must also be obvious from a common sense point. Diplomate Deng explained that his acupuncture examination showed very limited spinal mobility, limited ability to ambulate, redness of the face, sweating, pain and stiffness of the neck and shoulder.

" And after I check up with him, I found he has a limitation of mobility of the spine, and the neck and the lower back. It's really limited on his vertical area. He can only turn his neck on the left side 5 degrees or so, 10 degrees on the right, and almost--almost cannot sit down by himself." A.37

In addition, the patient's head protruded upward from the exam table; such that, it did not lie flat.
Q. Diplomate Deng, did you ever at any time have the patient lying flat on the examination table?
A. Yes. I did.
Q. And in the patient lying flat on the examination table did you notice anything in particular?
A. His head couldn't touch on the back flatly like the other -like normal people lie down. So I have to put--double up the pillow under his neck to support the head.
Q. Is it your testimony that you had to put a double pillow under the plaintiff's head to support his head so that it could rest comfortably, is that your testimony?
A. Yes
Q. And Diplomate Deng did that condition ever change?
A. No

Source: Book II A. 37, 38, Allowed Evidence A. 39 Trial Exhibit 12 : COURTROOM DEPUTY-Marcella El Shabazz
Transcribed by Drummond of Haddon Hts.,NJ
Swearing In of Diplomate Deng- A. 34

Full Transcript by Rita A. Doughterty 2-28-05
Appellate 3rd Circuit APP. 359-APP. 382

This testimony wholly supports the Petitioner's testimony at trial A. 28- A.32 The Petitioner described his 12-5-96 exam by Dr. Mancall MD-Neurologist and his medical student assistant (approximately 5 months subsequent to Diplomate Deng's Exam)

" At some point, I brought up about the spine and he walked over maybe to the wall. And when I brought up the spine, it was almost like a holdup. He put his hands in the air and he said:
'No, no don't touch the spine.'
' He said it like in a whine, and I really didn't question it beyond that. I know there was a little discussion about the spine. He may have theorized about gravity...'" Book II-A32

Diplomate Deng's testimony is subsequently wholly supported by the facts of Dr.Waterman's exam at the UCONN Medical School and subsequent x-rays and comparison x-rays. The gross range of motion of the head/neck is wholly supported by Dr. Waterman's finding of Ankylosing Spondylitis. Book II. A. 63,64

Q. Did you move the patient's head up and down.
A. Yes, As I said, he had decreased cervical range of motion in all directions, so up, down and sideways, right, left. (Excerpts : Book II- A.64 ln. 13)

This deals with GROSS spinal range of motion, inability to ambulate and head protruding off the examination table. Also, how can this NOT BE SEEN by Dr.Mancall- a surgeon since 1959. The presentation on 7-6-96 is clearly abnormal and supported by the testimonial evidence which is unrefuted by the respondents.
Book II-A33-A39

3. Dr.Waterman's testimony has controlling effect because it spells out treatment in great detail and further supports the OBVIOUSNESS criterion of Brophy.

Brophy v. Brizuela 358 Pa. Super 400, 405, 517 A.2nd, 1293-1296 (1986)

"I had the opportunity of seeing Mr.Maresca at UCONN Division of the Rheumatology Clinic on 9-8-1999. As you know, Mr.Maresca is a gentleman with a great deal of musculoskeletal complaints. In addition, he has a history of inflammatory bowel disease."

Book II-A. 68 and A. 69 describes the finding of Ankylosing Spondylitis (AS) and the treatment of sulfasalizine or an anti-inflammatory protocol.

TRIAL EXH. 96 This is not grey area testimony.
It is clearly within the reasonable man/person doctrine. Dr.Waterman's conclusion removes the question that treatment for the incurable disease Ankylosing Spondylitis was not necessary. The need for an anti-inflammatory protocol establishes the causal connection between the inflammatory bowel disease of Crohns and the exacerbation of the Ankylosing Spondylitis (AS) . A. 57-A. 71 of Book II A108-114 of Book II

4. Politz is controlling precedent if the Pa. law stare decisis doesn't deal with AS. Also, SSA law is a more controlling precedent because the Penn.law doesn't cover (AS)

SSA. DI 280 40.001 MINE 416.99c
[Medical Improvement Not Indicated for Ankylosing Spon.]

A grey area implies structure. Metzelfelt does not have rule formulations making it unstructured and not a grey area. In addition, the MINE definition under the SSA is controlling precedent federally which is widely accepted. For example, The United States Patent Office requires unobviousness but limits the area to novelty, drawings, prior art references, specimens...37CFR Par. 1.71 onward. Many examples of art in the preferred mode are on file. The 5th Circuit defines the disease Ankylosing Spondylitis and is the only circuit to do so excepting the SSA law:

" He was diagnosed as suffering from Ankylosing Spondylitis, a chronic, progressive and debilitating disease which fuses the spine and causes rigidity of the cervical, thoracic and lumbar vertebrae. "

Smith v. United States Railroad Retirement Board 95-60433 United States Court of Appeals-5th Circuit by Chief Judge Politz, Davis, Garza

5. Constitutional rights control with an undefined law. Felder v. Casey, 487 U.S. 131, 138 (1988)

This case establishes that the Supreme Court will protect an individual's federal rights from being limited by local practice. Contrast the Metzelfelt criteria to the unobviousness in the patent law which requires novelty, a specification, drawings, specimens

A jury never rendered a decision as the trier of facts in this case. In fact, huge bodies of testimonial evidence by Diplomate Deng-Acupuncturist, Dr.Waterman-Rheumatologist, Dr. Kellman-Internist and the plaintiff at trial were never cited by the DC Trial Court. Whatever omissions of critical testimony occurred in the rendering of the DC Trial Court opinion of 6/04 were carried forward as omissions by the 3rd Circuit Court of Appeals. Neither Court supported an election between Metzelfelt or Brophy.

6. Substantial grounds not previously presented are the new findings of skeletal pelvic and sacroiliac total joint destruction 5-31-05 x-rays of Dr. Lee MD, PhD which relates to the x-ray of the sacroiliac joints opined by Diplomate Felder. APP. 3rd Cir. Docket 47 Book II- A. 90--Dr.Felder-expert opines on sacroiliac joint

The implications are that the sacroiliac joint and pelvic area could have been treated with early detection by Dr.Mancall in his 12-5-96 exam. This aspect is wholly supported by the facts of Diplomate Deng's testimony on the difficulty in ambulation and getting on/off the examination table. A.33-9

7. The Trial Court addressed incurable diseases in its 5-7-04 opinion rendered with prejudice and changed to without prejudice on 8-30-04-- a time too late to do anything further because the matter was in the Appellate Court.

" However, in medical malpractice actions involving incurable diseases, because a causal connection between the care provided by a physician and resulting injury can often not be established to such a degree of medical certainty, the Court requires only that the treating physician's negligence was a substantial factor in causing Plaintiff's injury.

Joyce 694 A. 2d 657 In such cases, we require only that the treating physician's negligence was a substantial factor in causing plaintiff's injury. Accordingly, if the plaintiff has proven that the physician's breach increased the risk of harm, then there is sufficient evidence to overcome a motion for judgment as a matter of law. Id.

Montgomery v. S. Phil Medical Group Inc.-441 Pa. Super 146, 656 A 2nd 1395 (1995), Clayton v. Sabeh 406 Pa. Super, 335, 594 A 2nd 365 (1991) The expert in cases of this nature has been permitted to testify under the relaxed degree of certainty enunciated in Sec. 323 (a) of the Restatement (2nd) of Torts, that the defendant's failure to exercise reasonable care in the diagnosis & treatment was a substantial factor that increased the risk of harm. Eaddy 694 A2nd at 642 citing Billman, 761 A 2nd 1212

Dr. Felder-Neurologist-Expert articulated that symptomatology is the only aspect that can be treated for an incurable illness; such as, Ankylosing Spondylitis.
A113 P. 110 ln. 20
"It's treatment of symptomatology". (Expert -Felder)
P. 85 ln. 16 [also see A.67 to A69 for discovery date of AS]

Q. Do you agree that chronic tension headaches was an appropriate diagnosis?
A. Yes, it is a diagnosis of one of Mr.Maresca's symptoms.
(Expert-Felder on A. 113 Pg. 85 ln. 16 ; A135-43
Dr.Mancall's exam fails the scientific method of a hypothesis, conclusion and inference on 2 of 3 of the classic skeletal deformations demonstrated to him.

Diplomate Felder articulated that the patient had the tremendous risks of Ankylosing Spondylitis from 12-5-96 (date of Dr.Mancall's exam) to 9-15-99 the date of discovery of Ankylosing Spondylitis)
A. 112 Pg. 65-66 through A. 114

The Plaintiff's "Request for Reconsideration" in the DC Docket 87 contains an extensive discussion of the inflammatory implications of Ankylosing Spondylitis opined by the Petitioner's Expert-Diplomate Felder which connects to the overall fact witness testimony of Diplomate Deng-Acupuncturist, Dr.Waterman-Rheumatologist at the UCONN Medical School and Dr. Kellman MD-Internist and Treating Physician in the post-period of the 9-15-99 discovery of the disease Anklylosing Spondylitis. see Book II

Judge Legrome Davis changed his original opinion from a dismissal with prejudice to a dismissal of the case WITHOUT PREJUDICE based upon a lengthy deliberation of this Reconsideration document by 8-30-04. The Court indicated that it was too late to act because the case had been filed with the 3rd Circuit Court of Appeals.
[Book I -A.1]

7. Plan for a New Trial:

Make the same presentation but continuation in part of expert testimony of Diplomate Felder to clarify any areas where the court has further questions and/or explain in greater detail the connection between Dr. Mancall and pain and suffering in the intervening period of 12-5-96 through 9-15-1999- the discovery date of AS by Dr. Waterman of UCONN MEDICAL SCHOOL. The connection is basically that the patient wasn't treated or monitored for AS .I f the patient had been monitored, there would 've been less pain and suffering, as well as the chance for a remission and salvaging of the sacroiliac and pelvic joints - later totally destroyed by the 5-31-05 x-rays of Dr.Lee MD, PhD. At a new trial, Dr.Mancall's experts would be examined regarding their agreement or not with the 11-22-02 expert letter of Diplomate Felder MD-Neurologist . A.135 to A143

The Petitioner's expert-Diplomate Felder would be asked to critique on the incremental damages regarding the total destruction of the sacroiliac and pelvic joints which were in place substantially during Dr. Mancall's 12-5-96 exam. Dr.Lee's 8-9-2001 single AP view of the pelvis shows fusion of the sacroiliac joint symmetrically- unchanged since the prior lumbar spine series of 9-9-1999. A. 159

Dr. Mancall would be asked about circumstances surrounding the neurology award and any representations by him or his institution to the President of the American Academy of Neurology .

Damages: The damages are the late discovery of Ankylosing Spondylitis on 9-15-99 instead of 12-5-96 when the disease was present by Diplomate Felder's expert testimony. In addition, the sacroiliac and pelvic joints were totally obliterated by 5-31-05 and the patient is in the advanced stages of Ankylosing Spondylitis with kidney-proteinuria issues, as well as more chronic inflammations by the blood chemistry. The expert testimony of Diplomate Felder does concur that the first 10 years of the disease are important with respect to subsequent outcome. A. 113 Pg. 114 ln. 21
The patient had quality of life degradation, as well as patent interference with an in force patent 5,075,857 of 12/91 for Earthquake Monitoring during the period of non-discovery and the pendency of the 5 years of this litigation. This patent is prior art to at least 3 or more citations including fluid system art, an electronic rate meter controller and a networked agricultural monitoring system.
The Earthquake Monitoring Device has been acknowledged by the Cornell Research Foundation, the University of Maryland at College Park and the "employer at will" in an 8-1-1996 acknowledgment of the patent by the American Institute of Certified Public Accountants.
[5,574,657; 5,475,614 and 5,260,875]

ATTESTATION
UNDER RULE 44

This Petition for a Rehearing is presented in good faith by the Petitioner with no intention to delay the proceedings. The presentation highlights circumstances of a substantial or controlling effect and other substantial grounds not presented previously or not delineated or claimed with the level of particularity set forth in the current submission.

The grounds set forth explain the areas of the law which provide little or no rule structure as against the presentation of the evidence which is unmistakably clear and unambiguous, as well as new information which casts an increased exigency to the claimed injuries of the Petitioner .

Joseph A. Marasca

10.26-06